statute was given its present form by the substitution of common-law terms for "immovable and fixed property,"[37] the term "movable effects" continued to have its original meaning; nor was this changed by implication when the Anglo-American common law was adopted in 1893.[38]

A third method, or rather tendency, in statutory interpretation, called the "equitable," "conceives of the legislative rule as a general guide to the judge, leading him toward the just result,"[39] but insists that within wide limits he shall use his discretion in bringing about such a result. Thus, one representative of this school or tendency has argued that in case the judge has to choose between two competing interpretations, he should choose that one which is most in accordance with the "social ideals of the epoch."[40] One needs no argument to prove that the extension of married women's property rights is an ideal of the modern epoch, and the court in the principal case should therefore have adopted the more extensive interpretation. Or, if one dislikes the flavor of novelty in this suggestion, one can resort to no more modern a person than Lord Coke for the principle that "three things be favored in law: life, liberty and dower"[41]—a maxim approved by the Hawaiian court in an earlier case.[42]

(3) The words "in possession, or reducible to possession," in the statute do not exclude the possibility of its extending to choses in action; rather they are indicative of a survival of the primitive conception of a chose in action as a proprietary right. The early English law treated the action of debt as proprietary; the defendant was conceived of as having in his possession something belonging to the plaintiff which he ought to surrender.[43] The abstract idea of a chose in action as a *vinculum juris* comes from the Roman law, and in Blackstone's time had hardly ousted the primitive concept from English legal parlance.[44] The Hawaiian Court in 1893 defined a chose in action as "a right not reduced to possession."[45] Here again the analytical method of interpretation seems inferior to the historical.

It is submitted, therefore, that the decision in the principal case is not well grounded.

AGENT'S LIABILITY ON CONTRACTS MADE FOR UNDISCLOSED PRINCIPAL. — It is always easy for an agent in making a simple contract to avoid liability. He may do so by signifying that he is not to be held,[1] or,

DES PANDEKTENRECHTS, 6 ed., § 139, note 5. The terms *res immobiles* and *res mobiles* in the Roman law probably extended only to corporeal things. See the last two citations and PLANIOL, *supra*, No. 2195.

[37] See CIVIL CODE OF THE HAWAIIAN ISLANDS, 1859, § 1299.

[38] See note 30, *supra*.

[39] See Pound, "Enforcement of Law," 20 GREEN BAG, 405.

[40] See Stammler, "Wesen des Rechts und der Rechtswissenschaft," in SYSTEMATISCHE RECHTSWISSENSCHAFT (1913), 1–65, especially 44–45 and 56–57.

[41] See 2 COKE UPON LITTLETON, c. 11, 124 *b*.

[42] Matter of Vida, 1 Hawaii, 63, 65 (1852).

[43] See AMES, LECTURES ON LEGAL HISTORY, 88.

[44] 2 COMM. 397.

[45] *In re* Kealiiahonui, 9 Hawaii, 1, 6 (1893), quoting ANDERSON'S LAW DICTIONARY. Similar language is used in 2 BOUVIER'S DICTIONARY 2265 (1914).

[1] See 1 WILLISTON, CONTRACTS, § 285.

if acting within his authority, by merely revealing the fact of agency and the identity of his principal.[2] Where the principal is disclosed, reliance is ordinarily placed upon his credit alone, and the agent will not be held liable to the other contracting party unless clear proof is shown of an intent to substitute or add [3] the agent's liability for or to that of the principal.[4]

A willing agent who conceals the name of his principal or the entire fact of agency while making a contract is likely to find himself later in court answering personally for non-performance and unable to shield himself by showing that he acted within the scope of his employment. Thus, in a recent New York case [5] the action was on a written contract in which the defendant described himself as "Louis N. Shour, manufacturers' selling agent," and signed "L. N. Shour." The agent acted for an undisclosed principal and was held in damages for nondelivery under the contract. This result reached by the courts in cases of such contracts, written or oral, is substantially the same whether the principal was partly undisclosed [6] (his identity not revealed) or wholly undisclosed [7] (fact of agency also concealed [8]). But, on examination, the reasons appear to be different.

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[2] Owen *v.* Gooch, 2 Esp. 567 (1797); Whitney *v.* Wyman, 101 U. S. 392 (1879). See 2 KENT, COMM., Lect. XLI, p. 630.

[3] McCarthy *v.* Hughes, 36 R. I. 66, 88 Atl. 984 (1913).

[4] See Gerloff *v.* Carleton, 121 N. Y. Supp. 338, 339 (1910).

In every case in the light of its circumstances the question must be considered as to where reliance was placed by the contracting party, whether on the agent, or on the principal, or on both. Graham *v.* Stamper, 2 Vern. 146 (1690); Goodenough *v.* Thayer, 132 Mass. 152 (1882). See Boyd Grain Co. *v.* Thomas, 142 S. W. (Ark.) 1150 (1912). See also STORY, AGENCY, § 263.

An exception was early made in England in the case of a foreign principal, in which case the court presumed that, even though the foreign principal was named, reliance was placed upon the credit of the domestic agent. Die Elbinger Actien-Gesellschaft *v.* Claye, L. R. 8 Q. B. 313 (1873). See Thomson *v.* Davenport, 9 B. & C. 78, 86 (1829). This rule of presumption has been adopted only to a very slight extent among the United States. Vawter *v.* Baker, 23 Ind. 63 (1864); McKenzie *v.* Nevius, 22 Me. 138 (1842); Merrick's Estate, 5 W. & S. (Pa.) 9 (1842). See Hochster *v.* Baruch, 5 Daly (N. Y.), 440 (1874). The rule seems, moreover, to have been discredited in England of late. Miller, etc. Co. *v.* Smith & Tyrer, [1917] 2 K. B. 141. See Reading, C. J., in Brandt *v.* Morris, [1917] 2 K. B. 784, 792.

[5] Levy *v.* Shour, 178 N. Y. Supp. 227 (1919).

[6] In the following American cases the agents of partly undisclosed principals were held liable on simple contracts, either oral or in writing: Cooley *v.* Ksir (oral), 105 Ark. 307, 151 S. W. 254 (1912); McClure *v.* Central Trust Co. (written), 165 N. Y. 108, 58 N. E. 777 (1900); Davenport *v.* Riley (oral), 2 McCord (S. C.) 198 (1822). *Cf.* State *v.* Neelly, 60 Ark. 66, 28 S. W. 800 (1894). Other cases are collected in 1 WILLISTON, CONTRACTS, § 285, note 90; 1 MECHEM, AGENCY, § 1411.

In a recent English case the Court of Appeals refused to hold the agent of a partly disclosed principal on a simple contract in writing. Miller, etc. Co. *v.* Smith & Tyrer, [1917] 2 K. B. 141. See also Fleet *v.* Murton L. R. 7 Q. B. 126, 129 (1871); Pike *v.* Ongley, 18 Q. B. D. 708, 712 (1887).

[7] Jones *v.* Littledale (written), 1 N. & P. 677 (1837); Magee *v.* Atkinson (written), 2 M. & W. 440 (1837); Bartlett *v.* Raymond (oral), 139 Mass. 275, 30 N. E. 91 (1885); Meyer *v.* Redmond (written), 205 N. Y. 478, 98 N. E. 906 (1912). See collections of cases in 1 WILLISTON, CONTRACTS, § 284; 1 MECHEM, AGENCY, § 1410.

[8] Within this group fall cases where the agent in contracting has used no more than such phrases as "A, agent," or "A, broker." These words are regarded as mere *descriptio personae* and their use does not reveal the fact of agency. See 1 MECHEM, AGENCY, §§ 1408, 1410.

As the doctrine of the undisclosed principal has not been applied by the courts to sealed instruments [9] or to negotiable paper,[10] these two types of contracts will not be considered.

A, within the scope of his authority in fact, makes a simple contract with T, oral or in writing, expressly on behalf of his principal, but he does not name his principal P. In all common-law jurisdictions this partly undisclosed principal may be held,[11] and by American courts A is held.[12] However, little attention has been paid to the reason, if any, why both are responsible at T's election[13] on one contract. Looking at the apparent, expressed intent of the parties, it is clear on principles of contract that the undertaking is between T and P. There is no difficulty in a man contracting with whatever individual, firm, or corporation A is representing, provided he seems to mean that, and by the wording of his contract in this case such appears to be T's intent.[14] P, in our case, has authorized T to do exactly what he did. P's liability can thus be disposed of as contractual. But should A likewise be held at T's election? Unless there are circumstances which show that reliance was placed on A's credit and A thereby became a joint party to the contract, it is believed that there is no need at all for a rule that will hold A on such contracts.[15] This is the English method of approach.[16]

But suppose an agent in contracting acts contrary to the exact letter of his principal's instructions, though within the scope of his apparent authority. As the law stands, the principal is liable,[17] and doubtless the agent would be made to answer in contract by those courts in which he would have been held if he had acted within the exact terms of his authority. It is impossible on principles of contract to find an undertaking here between the third party and the principal, for there has been an entire lack of assent on the principal's part. We are forced to look elsewhere for the means of holding the latter; and, as we shall find in the following case of the wholly undisclosed principal, where contract doctrines by themselves fail to justify the result reached, a rule of agency well established by the cases points the way.

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[9] Borcherling *v.* Katz, 37 N. J. Eq. 150 (1883).

[10] Cragin *v.* Lovell, 109 U. S. 194 (1883).

[11] Thomson *v.* Davenport (oral), 9 B. & C. 78 (1829); Pentz *v.* Stanton (oral), 10 Wend. (N. Y.) 271 (1833); Isham *v.* Burgett (written), 157 Mass. 546 (1893). *Cf.* Rodliff *v.* Dallinger, 141 Mass. 1, 4 N. E. 805 (1886). See 1 WILLISTON, CONTRACTS, § 287; 2 MECHEM, AGENCY, § 1731.

[12] See note 6, *supra.*

[13] As to what constitutes an election, see 2 WILLISTON, CONTRACTS, § 289; 2 MECHEM, AGENCY, §§ 1754–1762.

[14] "But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party." Holmes, J., in Rodliff *v.* Dallinger, 141 Mass. 1, 5, 4 N. E. 805, 807 (1886).

[15] The surprisingly small number of actions brought in the courts against agents supports this contention.

Where the agent acts as agent but for an unidentified and irresponsible principal the agent is held anyhow, since it is to be presumed that the agent and the third party intended to make a contract, and as the principal is irresponsible in law the agent is the only available contractor. See 1 MECHEM, AGENCY, § 1389 and cases there cited. *Cf.* Lyon *v.* Williams, 5 Gray (Mass.), 557 (1856).

[16] See English cases cited in preceding notes.

[17] Brooks *v.* Shaw, 197 Mass. 376, 84 N. E. 110 (1908); Hubbard *v.* Tenbrook, 124 Pa. St. 291, 16 Atl. 817 (1889); Kinahan *v.* Parry, [1910] 2 K. B. 389; Watteau *v.* Fenwick [1893], 1 Q. B. 346. See Mechem, 23 HARV. L. REV. 513, 590, 599.

A, within the scope of his actual and apparent authority, makes a contract with T, oral or in writing,[18] in his own name but in fact on behalf of P, his wholly undisclosed principal. On the authorities either A[19] or P[20] may be held at T's election. That the principal should be liable is obviously fair. In the commercial world it is just as "plain commonsense"[21] that an undisclosed principal on discovery should be answerable as that a disclosed principal should be. It is his business back of the contract; his is the benefit and he should pay. Yet the well-settled rule of the cases which binds the wholly undisclosed principal has been proclaimed by eminent judges and writers to be an "anomaly" in our law.[22] So it is worth noting how the doctrine has been evolved.

The wholly undisclosed principal was first allowed his action, it is believed, in 1709.[23] A century before that, however, it had been said that the master and servant are "fained to be all one person;"[24] and as early as 1305[25] the maxim "qui facit per alium facit *per se*" had taken root in our law. Throughout the intervening centuries has grown in its various phases the doctrine of agency by which one not answerable on principles of contract or tort is held, where in fairness he should be held, for the act of another, his agent. This doctrine of identity of principal and agent resolves itself, in the case that concerns us, to this, — that the act of the agent in making the contract will be considered the act of the principal.[26] It is therefore the principal's contract, and on it the courts hold him. It would seem that after this step by a court there is no room

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[18] In the case of a simple contract in writing made in the agent's name but in fact on behalf of a principal whose name or whose existence is not disclosed in the writing even though known to all parties, oral evidence is not admissible to relieve the agent of liability on the contract. Jones *v.* Littledale, 6 Ad. & El. 486 (1837); Magee *v.* Atkinson, 2 M. & W. 440 (1837); Higgins *v.* Senior, 8 M. & W. 834 (1841); Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 54 N. W. 28 (1893). But it is received to charge the principal. Byington *v.* Simpson, 134 Mass. 169 (1883). See Higgins *v.* Senior, *supra*, at p. 844; Jones *v.* Littledale, *supra*, at p. 490; Ford *v.* Williams, 21 How. (U. S.) 287, 289 (1858); Wilson *v.* Hart, 7 Taunt. 295, 304 (1817). See also 2 SMITH'S LEADING CASES, 11 ed., p. 403 ff., note to Thomson *v.* Davenport.

[19] See note 7, *supra*.

[20] Kayton *v.* Barnett (oral), 116 N. Y. 625 (1889); Lerned *v.* Johns (written), 9 Allen (Mass.), 419 (1864); Watteau *v.* Fenwick (oral), *supra*. See long lists of cases in 1 WILLISTON, CONTRACTS, § 286; 2 MECHEM, AGENCY, § 1731.

[21] Holmes, 5 HARV. L. REV. 1.

[22] Lords Davey and Lindley in Keighley *v.* Durant, [1901] A. C. 240, 256, 261, 262; TIFFANY, AGENCY, 231, 232; HUFFCUT, AGENCY, § 118; Pollock, 3 L. QUART. REV. 359.

Professor Ames treats the rule as an anomaly but would justify the result as a short cut to allowing the third party to reach in the agent's hands the agent's asset in equity of the right to exoneration. Professor Ames was thus led to disagree with the case of Watteau *v.* Fenwick, *supra*. 18 YALE L. J. 443, reprinted in AMES, LECTURES ON LEGAL HISTORY, 453.

Professor Lewis in an interesting article suggests, to avoid the anomaly, the possibility of reaching the wholly undisclosed principal as a tortfeasor, or on quasi contractual grounds. 9 COL. L. REV. 116.

[23] Garrat *v.* Cullum, Buller, N. P. 42 (1709). *Cf.* Whitecombe *v.* Jacob, 1 Salk. 160 (T. 9 Anne). See Holmes, 5 HARV. L. REV. 1, 3 *ff.*

[24] WEST, SYMBOLEOGRAPHY, Part I, § 3 (1597?–1601).

[25] "*Qui per alium facit per se ipsum facere videtur*," Hengham, C. J., in Anonymous Case, Common Pleas, 1304–05, reported in FITZHERBERT'S ABRIDGMENT, *Annuitie*, pl. 51.

[26] For the historical development of this whole matter see the very learned essay on "Agency" by Mr. Justice Holmes, 4 HARV. L. REV. 345, 5 HARV. L. REV. 1.

on the contract for the agent. As the third party intended to have only one person on the contract with him, unless he will be made to suffer by the adoption of the rule of agency that the principal will be regarded as that person, there seems no reason for giving the third party a windfall which logic and reason do not support.[27] But the courts, though there have been but few cases, do hold the agent on the undertaking,[28] thus in effect keeping him on the contract as an extra party, for good measure. Theoretically, the agent's liability in the extraordinary situations in which it is to the interest of the third party to pursue him instead of his principal should be in tort, or the result of an estoppel.

There may be some who have difficulty in recognizing that, when all arrangements are made by an agent possessed of an intellect and free will, a contract can be effected between a third party and a partly undisclosed, or even a wholly disclosed principal. For them it is suggested that the line of thought shown here in the case of the wholly undisclosed principal resting upon the doctrine of identity might be utilized to cover all three types of principals. The result then urged would be this, that the moment an agent enters the field of contracts, as when he enters the field of torts, the doctrine of *respondeat superior* accompanies him in his dealings and, by its strength alone, adds the responsibility of another party, the principal, to the responsibility already resting upon the agent in contract or tort.

SILENCE AS ACCEPTANCE IN THE FORMATION OF CONTRACTS. — "He who remains silent certainly does not speak; but nevertheless it is true that he does not deny."[1] The situation expressed by this truism has been the source of considerable confusion in our law of contracts. The decisions are almost as varied as the jurisdictions, and nowhere do we find an adequate analysis of the questions involved or the principles upon which they must be decided. Though acceptance of an offer is usually made by spoken or written words, quite often the offer may call for an act or authorize some other mode of acceptance. As the offeror is the "czar of his offer" such acts, when induced by the offer,[2] constitute an

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[27] "The rule is probably the outcome of a kind of common-law equity, powerfully aided and extended by the fiction of the identity of principal and agent and the doctrine of reciprocity or mutuality of contractual obligations," HUFFCUT, AGENCY, § 120, speaking of the liability of the wholly undisclosed principal and of his right to sue.

[28] Of the cases in note 7, *supra*, Jones *v.* Littledale and Magee *v.* Atkinson were actions of assumpsit; Bartlett *v.* Raymond was "contract for goods sold and delivered." The action in Meyer *v.* Redmond brought under the New York Code is described by Haight, J., in the opening of his opinion at p. 480, as follows: "This action was brought to recover damages which the plaintiff is alleged to have suffered by reason of the failure of the defendants to perform their contract."

[1] Digest, L, 17, 142 (Paulus). See POUND, READINGS IN ROMAN LAW, 2d. ed., 25–26.

[2] If the act is performed in ignorance of the offer, as where a reward is offered for the capture of a felon, there is no contract. Ball *v.* Newton, 61 Mass. 599 (1851); Fitch *v.* Snedaker, 38 N. Y. 248 (1868); Williams *v.* West Chicago St. Ry. Co., 191 Ill. 610, 61 N. E. 456 (1901). The English courts have entertained a contrary view. Williams *v.* Carwardine, 4 B & Ad. 621 (1833); Gibbons *v.* Proctor, 64 L. T. (N. S.) 594 (1891). Also, if the offeree expressly states that his acts are not performed in accept-